16

Nos. 01-950, 01-1018

Supreme Court, U.S.
FILED
APR 15 2003
OFFICE OF THE CLERK

In the Supreme Court of the United States

HILLSIDE DAIRY, INC., A&A DAIRY, L&S DAIRY, and MILKY WAY FARMS,

Petitioners,

v.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, and ROBERT TAD BELL, Undersecretary, Department of Food & Agriculture, State of California,

Respondents.

PONDEROSA DAIRY, PAHRUMP DAIRY, ROCKVIEW DAIRIES, INC., and DARREL KUIPER and DIANE KUIPER, D/B/A D. KUIPER DAIRY,

Petitioners,

v.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, and ROBERT TAD BELL, Undersecretary, Department of Food & Agriculture, State of California,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

LAWRENCE S. ROBBINS
ROY T. ENGLERT, JR.
ROBBINS, RUSSELL, ENGLERT ORSECK & UNTEREINER LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

CHARLES M. ENGLISH, JR.*
WENDY M. YOVIENE
NICHOLAS C. GEALE
THELEN REID & PRIEST, LLP
701 Pennsylvania Ave., N.W.
Suite 800
Washington, D.C. 20004
(202) 508-4000

* *Counsel of Record, 01-950*

(Additional counsel listed on inside front cover)

30 pp

JOHN H. VETNE
15 Powow St.
Amesbury, MA 01913
(978) 388-2480

RICHARD HESSE**
2 White Street
Concord, NH 03301
(603) 228-1541

** *Counsel of Record, 01-1018*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. SECTION 144 OF THE 1996 FARM BILL DOES NOT EXEMPT CALIFORNIA'S PRICING AND POOLING PLANS FROM COMMERCE CLAUSE SCRUTINY 2

II. ANALYSIS OF THE PRIVILEGES AND IMMUNITIES CLAUSE CLAIMS MUST CONSIDER THE PRACTICAL EFFECT OF THE REGULATORY SCHEME ON OUT-OF-STATE DAIRY FARMERS 12

III. RESPONDENTS AND THEIR AMICUS MISSTATE CRITICAL FACTS BEARING ON THE CONSTITUTIONAL MERITS, BUT THE COURT NEED NOT RESOLVE THOSE ISSUES 16

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

Austin v. *New Hampshire*, 420 U.S. 656 (1975) 13, 15

Baldwin v. *G.A.F. Seelig, Inc.*,
294 U.S. 511 (1935) 3, 11, 17

Brown-Forman Distillers Corp. v. *New York State Liquor Authority*, 476 U.S. 573 (1986) 3

C&A Carbone, Inc. v. *Town of Clarkstown*,
511 U.S. 383 (1994) 3

Chalker v. *Birmingham & N.W. Ry.*,
249 U.S. 522 (1919) 12, 13

Chemical Waste Management, Inc. v. *Hunt*,
504 U.S. 334 (1992) 15

Chickasaw Nation v. *United States*,
534 U.S. 84 (2001) 4

Circuit City Stores, Inc. v. *Adams*,
532 U.S. 105 (2001) 7

City of Edmonds v. *Oxford House, Inc.*,
514 U.S. 725 (1995) 8

County Line Cheese Co. v. *Lyng*,
823 F.2d 1127 (7th Cir. 1987) 18

Dean Milk Co. v. *City of Madison*,
340 U.S. 349 (1951) 14

TABLE OF AUTHORITIES – Continued

Page(s)

Dellmuth v. *Muth*, 491 U.S. 223 (1989) 3

Gregory v. *Ashcroft*, 501 U.S. 452 (1991) 3

Group Life & Health Ins. Co. v. *Royal Drug Co.*, 440 U.S. 205 (1979) 5

Hicklin v. *Orbeck*, 437 US 518 (1978) 14, 15

Hughes v. *Oklahoma*, 441 U.S. 322 (1979) 15

Lehigh Valley Coop. v. *United States*, 370 U.S. 76 (1962) 18

Lewis v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980) 7

Lunding v. *New York Tax Appeals Tribunal*, 522 U.S. 287 (1998). 13, 15

Morales v. *TWA*, 504 U.S. 374 (1992) 9

New Energy Co. v. *Limbach*, 486 U.S. 269 (1988) 3, 20

New England Power Co. v. *New Hampshire*, 455 U.S. 331 (1982) 4, 7

New York State Conf. of Blue Cross & Blue Shield Plans v. *Travelers Ins Co.*, 514 U.S. 645 (1995) 11

Paul v. *Virginia*, 75 U.S. (8 Wall.) 168 (1868) 14

PBGC v. *LTV Corp.*, 496 U.S. 633 (1990) 6

TABLE OF AUTHORITIES -- Continued

Page(s)

Pilot Life Ins. Co. v. *Dedeaux*, 481 U.S. 41 (1987) 9

Prudential Ins. Co. v. *Benjamin*,
328 U.S. 408 (1946) 6

Rodriguez v. *United States*, 480 U.S. 522 (1987) 6

Salinas v. *United States*, 522 U.S. 52 (1997) 3, 4

Shamrock Farms Co. v. *Veneman*,
146 F.3d 1177 (9th Cir. 1998),
cert. denied, 525 U.S. 1105 (1999) 10

Shamrock Farms Co. v. *Veneman*,
No. CIV-S-95-318, slip op. (E.D. Cal.
June 5, 1995) 6

South-Central Timber Dev., Inc. v. *Wunnicke*,
467 U.S. 82 (1984) 2, 3, 7

Supreme Court of New Hampshire v. *Piper*,
470 U.S. 274 (1985) 15

Toomer v. *Witsell*, 334 U.S. 385 (1948) 15

United Building & Construction Trades Council v.
Mayor of Camden, 465 U.S. 208 (1984) 13, 15

United States v. *Nordic Village, Inc.*,
503 U.S. 30 (1992) 3

United States v. *South-Eastern Underwriters*
Association, 322 U.S. 533 (1944) 5

TABLE OF AUTHORITIES – Continued

Page(s)

Ward v. *Maryland*, 79 U.S. (12 Wall.) 418 (1870) 13

Washington State Dep't of Social & Health Servs. v. *Guardianship Estate of Keffeler*, 123 S. Ct. 1017 (2003) 7

West Lynn Creamery, Inc. v. *Healy*, 512 U.S. 186 (1994) 20

Constitution, Statutes, and Regulations

U.S. CONST. Art. IV, § 2 (Privileges and Immunities Clause) 12

7 U.S.C. § 608 *et seq.* 18

Federal Agricultural Improvement and Reform Act of 1996 (1996 Farm Bill), Pub. L. No. 104-127, §§ 143-145, 110 Stat. 888, 915-918 (codified at 7 U.S.C. §§ 7253-7255):

7 U.S.C. § 7253(a)(2) 9

7 U.S.C. § 7254 ..... 1, 4, 8, 9

McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 5

15 U.S.C. § 1011 5

15 U.S.C. § 1012(a) 5

15 U.S.C. § 1012(b) 4, 5

TABLE OF AUTHORITIES – Continued

Page(s)

Milk and Milk Products Act of 1947, Cal. Food & Agric. Code §§ 32501-39912:

Cal. Food & Agric. Code § 35784 9

Milk Stabilization Act, Cal. Food & Agric. Code §§ 61801-62403:

Cal. Food & Agric. Code § 61802(c) 11

Cal. Food & Agric. Code §§ 62077-62078 17

California Department of Food & Agriculture, Pooling Plan for Market Milk, as amended, effective July 1, 1997:

Pooling Plan § 900(d) 20

Pooling Plan § 921.2(e), (f) 20

Miscellaneous

L.J. Butler, Maintaining the Competitive Edge in California's Dairy Industry: Part I – Organization and Structure (1992) 10

Economic Research Service, USDA, Nationwide Adoption of the California Solids Standards for Fluid Milk Products, Staff Rep. No. AGES840816 (Aug. 1984) 10

TABLE OF AUTHORITIES – Continued

Page(s)

John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981) 13

H.R. CONF. REP. NO. 104-494 (1996), *reprinted in* 1996 USCCAN 683 6

Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261 (1987) 13

REPLY BRIEF FOR PETITIONERS

This case presents (1) a statutory question about the scope of 7 U.S.C. § 7254 and (2) a constitutional question about the applicability of the Privileges and Immunities Clause to state requirements that discriminate in practical effect through the use of a classification that correlates closely with citizenship. This case does not call on the Court to resolve the underlying merits of the constitutional questions raised in the lawsuits.

With respect to the statutory question, respondents argue (a) that this Court's requirement that a Commerce Clause exemption be "unmistakably clear" does not really require the highest level of clarity, especially in light of "state sovereignty" principles (Resp. Br. 16-18); (b) that "it would have been pointless for Congress to have enacted Section 7254 without including a dormant Commerce Clause exemption" (Resp. Br. 21), so Congress *must have* included such an exemption in the statute, despite the lack of any allusion to the Commerce Clause in the statute or its legislative history; and (c) that the economic regulations of raw milk challenged in this litigation are somehow related to the compositional regulations of fluid milk referred to in the statute, so it is unmistakably clear that the protected California laws include the former as well as the latter, even though the statute does not say that it protects laws merely *related to* those it specifically protects (Resp. Br. 23-33). In each step of this analysis, respondents are demonstrably wrong, as we show in Point I below.

With respect to the Privileges and Immunities Clause question, respondents defend the Ninth Circuit's holding that petitioners' claim should be dismissed because the statutes and regulations at issue do not facially classify milk producers on the basis of citizenship or residency. Respondents assert that the contrary precedents on which petitioners rely are inapposite, and that undisturbed precedents of this Court are diminished over time by lack of frequent citation. Respondents are not correct in these assertions, as we show in Point II below. We further discuss in Point II the Solicitor General's suggestion that the Court should adopt a requirement that challengers

of facially neutral state laws asserting a Privileges and Immunities Clause claim must show intentional discrimination as a threshold matter, but the issue – as the Solicitor General acknowledges – is one that the Court need not reach. Rather, the "appropriate disposition" would be for the Court to "make clear that facial discrimination against citizens or residents of other States is not required and remand the claim for further consideration on the merits by the lower courts." U.S. Br. 28.[1]

Finally, respondents' amicus offers a response to our observations about the seriousness of the underlying constitutional challenges. This Court should not reach the constitutional merits, but we endeavor briefly to dispel some of the confusion underlying amicus's arguments – and correct a few of the misstatements in respondents' brief – in Point III below.

I. SECTION 144 OF THE 1996 FARM BILL DOES NOT EXEMPT CALIFORNIA'S PRICING AND POOLING PLANS FROM COMMERCE CLAUSE SCRUTINY

A. "[F]or a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be *unmistakably clear*." *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 91 (1984) (emphasis added). It is difficult to imagine what more emphatic words this Court could have chosen to indicate the stringency of the clear-statement requirement applicable in this context. Yet respondents suggest that this Court really meant to express some form of intermediate scrutiny, less stringent than the clear-statement rule applicable in what respondents call "state sovereignty" cases. Resp. Br. 17.

Both as a matter of precedent and as a matter of logic and constitutional structure, respondents err. This Court's Justices have not treated the Commerce Clause clear-statement requirements and the requirements applicable in other areas as differ-

---

[1] Except as otherwise noted, all references in this reply brief to "U.S. Br." are to the brief on the merits filed February 24, 2003.

ent. See *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 410 (1994) (O'Connor, J., concurring in the judgment) (citing, in Commerce Clause case, sovereign immunity decisions in *Dellmuth* v. *Muth*, 491 U.S. 223, 230 (1989), and *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992)). And it is broader principles of *federalism* – not merely "state sovereignty," which is but one aspect of federalism – that drive "the rules of construction [the Court has] followed to give proper respect to the federal-state balance." *Salinas* v. *United States*, 522 U.S. 52, 60 (1997) (citing, among other cases, *Gregory* v. *Ashcroft*, 501 U.S. 452, 467 (1991)). The entire concept of dormant Commerce Clause jurisprudence is that the *grant* of certain powers to Congress in the Clause is a simultaneous *denial* of certain powers to the States. *New Energy Co.* v. *Limbach*, 486 U.S. 269, 273 (1988). The structure of the Constitution demands just as clear a statement to alter that balance as it does to alter other federal-state balances.

Even if the entire purpose of clear-statement rules were to protect "state sovereignty," not the overall federal structure, California would not be the only State whose sovereign interests are to be considered. The States of Nevada, Minnesota, Montana, Oregon, Washington, and Wisconsin have appeared in this Court as amici curiae supporting petitioners. By vesting certain powers in the National Government to the exclusion of the individual States – such as the power to set minimum prices for interstate milk transactions, denied to the States by *Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511 (1935), but allowed to the U.S. Secretary of Agriculture through the Federal Milk Marketing Order program – the Commerce Clause protects the sovereign States from encroachment by each other. Cf. *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573, 585 (1986). Before the Commerce Clause's protections are negated, then, it makes perfect sense to demand that the intent of Congress be made "unmistakably clear" (*South-Central Timber*, 467 U.S. at 91), so that it would be "plain to anyone reading the Act" (*Gregory*, 501 U.S. at 467; *Salinas*, 522 U.S.

at 60) that it negates the dormant Commerce Clause with respect to the laws and regulations at issue.

B. Petitioners and the United States have demonstrated that Section 144 of the 1996 Farm Bill, 7 U.S.C. § 7254, protects a set of California laws only from limitation by federal *statutory and regulatory* law and is not a Commerce Clause exemption, even for the state laws it protects. Pet. Br. 23-25, 30, 33 n.10; U.S. Br. 11-14. Respondents attempt – but fail – to show otherwise. Resp. Br. 18-23; see also WUD Br. 25-27.

Respondents' first argument is that there would be "surplusage" in the statute if it were not construed as a Commerce Clause exemption, because each verb in the phrase "preempt, prohibit, or otherwise limit" must have a distinct meaning. Resp. Br. 19-20. But milk is regulated at the federal level by numerous statutes, USDA regulations, USDA orders, and FDA regulations. See Pet. Br. 2-4. To ensure that none of *those* sources of federal statutory and administrative law would impede California's enforcement of its compositional standards for milk, Congress naturally used a broad series of verbs. To suggest that the breadth of the series of verbs requires a conclusion that Congress had the Commerce Clause in mind is to engage impermissibly in "mere speculation as to what Congress 'probably had in mind.'" *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982) (citation omitted).[2]

Respondents next argue that "[t]he language of Section 7254 is similar in breadth or specificity to the language of

---

[2] In any event, surplusage is hardly unknown in federal statutory law. See, *e.g.*, *Chickasaw Nation* v. *United States*, 534 U.S. 84, 89, 94 (2001). The use of potentially redundant verbs to make emphatic the intent of Congress that federal statutory law not preempt state law is particularly common. *E.g.*, McCarran-Ferguson Act § 2(b), 15 U.S.C. § 1012(b) ("No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * *.").

the statutes and regulations that have previously been relied on by the Court in finding a dormant Commerce Clause exemption" (Resp. Br. 20), and place particular emphasis on the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015. There is, however, no relevant similarity between the McCarran-Ferguson Act (or any other statute respondents cite) and Section 144. Rather, as the Solicitor General observes (U.S. Br. 11-12 & n.2), "Congress has * * * spoken with considerably greater clarity in expressing its intent to immunize state laws from the implied limitations of the Commerce Clause."

Section 1 of the McCarran-Ferguson Act, 15 U.S.C. § 1011, provides that "Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." Section 2(a), 15 U.S.C. § 1012(a), provides that "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." Those extraordinarily broad affirmative grants of power to the States facially constitute Congress's effort to shift power over an entire business to the States. That shift could only be accomplished by negating the operation of the dormant Commerce Clause – the Clause that gives constitutional significance to "silence on the part of the Congress," 15 U.S.C. § 1011 – to restrict the States' power, and has no parallel in Section 144.[3] Furthermore, "[t]he law was enacted in 1945 in response to this Court's decision in *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533 [1944]" (*Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 217 (1979)), which

---

[3] Section 144, instead, is most parallel to Section 2(b) of the McCarran-Ferguson Act, see note 2, *supra*, which is *not* the portion of the Act that effects a Commerce Clause exemption.

Congress considered "precedent-smashing" (*id.* at 218 n.16) precisely because it deemed insurance to be interstate commerce. See also *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 412-418, 427-433 (1946). Section 144 of the 1996 Farm Bill, by contrast, was enacted in response to an NLEA preemption decision, *Shamrock Farms Co.* v. *Veneman*, No. CIV-S-95-318, slip op. 3 (E.D. Cal. June 5, 1995). See Pet. Br. 32.

Indeed, respondents *concede* that "Section 7254 was Congress's response to NLEA" (Resp. Br. 22), yet they do so in the midst of an argument that "it would have been pointless for Congress to have enacted Section 7254 without including a dormant Commerce Clause exemption" (Resp. Br. 21). The concession is correct, but the argument in which it is embedded is not.

The question presented in this case is whether Congress (a) wanted California to be able, free of obstacles Congress itself and administrative agencies had imposed, to maintain its standards of identity for fluid milk or (b) wanted California to be able, free of *all* obstacles including constitutional prohibitions, to maintain its standards of identity for fluid milk (and to maintain and change its economic regulations for raw milk). Respondents merely *assert* – with no stronger supporting evidence than general statements in legislative history that California should be "able to fully enforce and apply its fluid milk standards" (H.R. CONF. REP. NO. 104-494 at 339, *reprinted in* 1996 USCCAN 683, 701, *quoted in* Resp. Br. 22) – that the latter, broader exemption rather than the former, narrower exemption was intended. But that technique of statutory interpretation runs afoul of two lines of this Court's precedents. First, it runs afoul of the rule that "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *PBGC* v. *LTV Corp.*, 496 U.S. 633, 647 (1990) (quoting *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987))

(emphasis in original).[4] Second, it runs afoul of the rule that "congressional intent must be unmistakably clear" before a statute will be construed to effect a dormant Commerce Clause exemption. *South-Central Timber*, 467 U.S. at 91.

Amicus complains that it is "simply *ex cathedra* without support in precedent or logic" (WUD Br. 26) to argue that "this Act or any other provision of law" is most naturally read to refer to nonconstitutional sources of law. This Court recently reaffirmed, however, that statutory phrases such as "other legal process" are to be construed by reference to the phrases that precede them. *Washington State Dep't of Social & Health Servs.* v. *Guardianship Estate of Keffeler*, 123 S. Ct. 1017, 1025 (2003). "'Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-115 (2001), *quoted in Keffeler*, 123 S. Ct. at 1025. "Other provision of law," no less than "other legal process," should be construed in accordance with the *noscitur a sociis* and *ejusdem generis* canons applied in *Keffeler*. Section 144 is not a Commerce Clause exemption at all.

C. Petitioners and the United States have demonstrated that, whether or not it constitutes a Commerce Clause exemption, Section 144 does not exempt California's regulations governing the pricing and pooling of raw milk. Pet. Br. 16-23, 25-34; U.S. Br. 14-19. Respondents argue, to the contrary, that the relationship between raw-milk economic regulation and fluid-milk content regulation is so close that Congress must have exempted the former as well as the latter. Resp.

---

[4] Statutes that grant States authorization to take particular actions without contravening federal statutory law, but leave them subject to the constraints of the Commerce Clause, are not at all uncommon. See, *e.g.*, *New England Power Co.* v. *New Hampshire*, 455 U.S. at 341; *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 49 (1980).

Br. 23-33. To make that argument, however, respondents must misdescribe both the federal statute and the state programs.

According to respondents, "The only possible limitation to the scope of Section 7254 is that the laws and regulations must regard *or relate to* fluid milk composition or labeling." Resp. Br. 24 (emphasis added). But that is not what the statute says at all. It refers to "any law, regulation, or requirement regarding * * * (1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or * * * (2) the labeling of such fluid milk products with regard to milk solids or solids not fat." 7 U.S.C. § 7254. Surrounding provisions speak with precision about "quota" and "manufacturing allowances," key components of California's systems of economic regulation. See Pet. Br. 22-23. Yet, respondents contend, Congress resorted to indirection and imprecision in Section 144, encompassing the entirety of California's pricing and pooling regulations for raw milk within the phrase "law, regulation, or requirement regarding [composition and labeling regulations for fluid (processed) milk]." The word "regarding" will not bear such weight – which is presumably why respondents attempt to insert "relate to" into the statute.

This Court has not given an expansive construction to the word "regarding" in federal statutes. In *City of Edmonds* v. *Oxford House, Inc.*, 514 U.S. 725 (1995), the Court held that a particular statute's "language – 'restrictions *regarding* the maximum number of occupants permitted to occupy a dwelling' – surely encompasses maximum occupancy restrictions. But the formulation does not fit family composition rules typically tied to land-use restrictions." *Id.* at 734-735 (emphasis added and footnote omitted). Yet *Edmonds* would have had to come out the other way if "regarding" were as broad a term as "relating to." Family composition rules certainly can – and the zoning rule at issue in *Edmonds* did (see *id.* at 728) – *relate to* the maximum number of occupants permitted to occupy a single-family dwelling unit. The "deliberately expansive" phrase

"relating to" (*Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 46 (1987); see also *Morales* v. *TWA*, 504 U.S. 374, 383-384 (1992)) does not appear in Section 144 and should not be read into it when the word the statute does use – "regarding" – is conventionally and in context given a narrower meaning.

Even if a "relationship" between California's pricing and pooling laws for raw milk and its standards of composition for fluid milk somehow mattered, respondents could not prevail because they have overstated the relatedness of the three distinct sets of laws. Composition standards deal with ingredient content of fluid milk (milkfat, solids not fat (SNF), and water) after it has been processed and packaged. *E.g.*, Cal. Food & Agric. Code § 35784 (prescribing content of "[m]arket milk, at the time of delivery to the consumer"). They regulate the conduct of processors, not dairy farmers, are administered by the Milk and Dairy Foods Control Branch of CDFA, and correspond to FDA (not USDA) regulations at the federal level. See Pet. Br. 2-3, 6-7. Minimum pricing and pooling regulations, on the other hand, deal with the economic regulation of unprocessed milk sales by dairy farmers to processors. See Pet. Br. 3, 7-10. The Milk Stabilization Branch administers minimum prices, and the Pooling Branch separately administers pooling. *Ibid.* The history of these three different programs establishes that composition standards can be administered without regard to minimum pricing or pooling. California's composition standards existed for 28 years before minimum pricing existed, 62 years before pooling existed, and 90 years before the challenged 1997 pooling amendments existed. *Ibid.* California does not need pricing and pooling *at all* – let alone the 1997 amendments extending aspects of California's economic regulatory programs extraterritorially – to "establish or continue to effect" compositional regulation. 7 U.S.C. § 7254. Indeed, by providing *in the 1996 Farm Bill itself* a mechanism (see 7 U.S.C. § 7253(a)(2), JA 17) to replace California pricing and pooling with a federal milk marketing order, Congress irrefutably demonstrated *its* understanding that Section 144

would have meaning and effect with or without any particular pricing or pooling rule.

The assertion that California's pricing and composition standards are connected by historical relationship (Resp. Br. 24-25) is misleading in that it suggests that the fortification requirements adopted in 1968 could not have been implemented without changing the minimum price regulations to multiple-component pricing. The composition standards and multiple-component pricing were linked by interest-group politics, not inherent interrelatedness. See Economic Research Service, USDA, Nationwide Adoption of the California Solids Standards for Fluid Milk Products, Staff Rep. No. AGES840816 at 3 (Aug. 1984) ("[P]roducers resisted the processors' efforts. A compromise was ultimately reached which allowed the marketing of lowfat milk in California, but only in conjunction with revisions in the state milk marketing order to include payment * * * which took explicit and direct account of both the fat and SNF content of a producer's milk."). In any event, as the Solicitor General has observed, component pricing under the Stabilization Act pertains to the fat and SNF components of *raw* milk, whereas Section 144 refers to the percentage of the added ingredients in *fluid* milk. U.S. Br. 15 n.4.[5]

---

[5] Compliance with packaged-fluid-milk standards is achieved not from raw milk, for which there is no state composition regulation, but from processor activities of "adding or subtracting fats and solids to meet the minimum and maximum level for standardized products." L.J. Butler, Maintaining the Competitive Edge in California's Dairy Industry: Part I – Organization and Structure 25 (1992). "In order for milk processors to comply with California's compositional standards, they must fortify most of their milk by adding condensed milk or milk powder." *Shamrock Farms Co.* v. *Veneman*, 146 F.3d 1177, 1178 (9th Cir. 1998), cert. denied, 525 U.S. 1105 (1999). California does not regulate prices for these finished manufactured products, but provides a subsidy to processors in the form of a fortification allowance.

The assertion that *minimum* prices are somehow necessary to control raw milk costs, in order to prevent California's heightened composition standards from making packaged beverage milk more expensive for consumers (Resp. Br. 26), is a counterintuitive, post hoc rationalization that is contradicted by the California trade association for processors. Dairy Institute of California explained at the cert. stage that its interest in this litigation was in preserving unimpeded access to out-of-state milk in order to control processors' raw milk costs. Dairy Inst. Br. 4 (filed Mar. 5, 2002).

The assertion that there have been formal declarations that California's minimum price regulations are important to the maintenance or advancement of composition standards (Resp. Br. 27) cannot save the day for respondents. They rely on Cal. Food & Agric. Code § 61802(c) (JA 23), which declares at a very high level of generality that some relationship exists between economic regulation of milk and "standards of content and purity." A similar observation, at an equally high level of generality, was conceded to be true in *Baldwin*, 294 U.S. at 523 ("Economic welfare is always related to health, for there can be no health if men are starving."). But this Court went on to say that "giv[ing] entrance to that excuse would invite a speedy end to our national solidarity." *Ibid.* The question now before the Court is not whether one can find a high enough level of generality to state some way in which composition standards are *related to* economic regulation – "really, universally, relations stop nowhere" (*New York State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins Co.*, 514 U.S. 645, 655 (1995)) – but whether it is unmistakably clear that Congress wished to make an exception to "our national solidarity" broad enough to cover state pricing and pooling plans. Respondents have not shown that Congress did so. Their attempt to connect pricing to composition, then pooling to pricing, and then pooling to composition is far too attenuated for this Court to conclude that Congress clearly intended to exempt all pooling regulations from Commerce Clause scrutiny.

II. ANALYSIS OF THE PRIVILEGES AND IMMUNITIES CLAUSE CLAIMS MUST CONSIDER THE PRACTICAL EFFECT OF THE REGULATORY SCHEME ON OUT-OF-STATE DAIRY FARMERS

A. Respondents argue that *Chalker* v. *Birmingham & N.W. Ry.*, 249 U.S. 522, 527 (1919), is inapplicable to the situation before the Court and that its precedential value is diminished by the infrequency with which it has been cited. Respondents misperceive the opinion in *Chalker*, whose approach has been followed even when the case has not been cited.

In *Chalker* this Court clearly stated its disagreement with the conclusion of the Tennessee Supreme Court that Tennessee did not violate the Privileges and Immunities Clause because citizens of Alabama could avoid alleged discrimination simply by locating their chief business office in Tennessee. Following the discredited lead of Tennessee, California has consistently argued that out-of-state dairy farmers may avoid alleged discrimination simply by locating their farms in California, and the Privileges and Immunities Clause therefore does not apply.

This Court made clear that practical considerations are significant: "neither under form of classification nor otherwise can any state enforcing tax laws which in their practical operation materially abridge or impair the equality of commercial privileges secured by the federal Constitution." 249 U.S. at 526-527.

Respondents (at 37-38) and their amicus (WUD Br. 29-30) seek to distinguish *Chalker* by focusing on a single line in the opinion: "We can find no adequate basis for taxing individuals according to the location of their chief offices – the classification, we think, is arbitrary and unreasonable." 249 U.S. at 527. That statement, however, is the application of the constitutional standard to the facts presented and has no bearing on the preliminary question whether there is discrimination within the scope of Article IV, § 2. The Court was simply addressing the

merits and drawing the conclusion that the Tennessee statute failed to provide any "substantial reason for the difference in treatment." *United Building & Construction Trades Council* v. *Mayor of Camden*, 465 U.S. 208, 222 (1984).

Respondents argue (at 38-39) that *Chalker* is somehow diminished by the relatively infrequent references to it by the Court and by the absence of something they call the "practical effects test."[6] To reach that conclusion, respondents set aside the illustrative precedents of *Austin* v. *New Hampshire*, 420 U.S. 656 (1975), and *United Building & Construction Trades Council, supra*, cited in petitioners' opening brief (at 46-47). In those cases, the practical approach reflected in *Chalker* is employed and preserved, while the formalistic approach urged by respondents is rejected. Indeed, the well-established reach of the Clause to protect non-residents against state discrimination is itself a practical "effect" test to protect "citizens of each state." *Ward* v. *Maryland*, 79 U.S. (12 Wall.) 418, 430 (1870). With or without citation to *Chalker*, a "concern with practical effect" has continued to animate this Court's analysis and resolution of Privileges and Immunities Clause claims. *Lunding* v. *New York Tax Appeals Tribunal*, 522 U.S. 287, 301 (1998).

Given that it is a "rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate

---

[6] There is irony in respondents' suggestion that this Court disavow *Chalker* because it is old and infrequently cited. Most observers think that this Court's Privileges and Immunities Clause precedents since 1919 have moved *away* from "absurd formalism." Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 270 n.35 (1987). See also John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 181 (1981) (The Privileges and Immunities Clause "was plainly intended to prevent discrimination against out-of-staters * * *. And indeed, with minor and soon-corrected diversions, that is precisely the spirit in which it has been interpreted for the two centuries it has been in the Constitution.").

goods" (*Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 (1951)), limiting Privileges and Immunities Clause claims to facial discrimination against citizens of other States would put citizens at the mercy of legislative ingenuity in crafting discriminatory laws. There is no reason for this Court to depart from precedent and embrace such an approach.[7]

B. The Solicitor General supports the conclusion that the Ninth Circuit erred in dismissing the Privileges and Immunities Clause claim. By analogy to developments in equal protection law, however, the Solicitor General suggests that intentional discrimination might be an appropriate threshold requirement, at least in the case of a facially neutral state statute. U.S. Br. 24-27. Petitioners respectfully disagree.

It is established law that the Commerce Clause and the Privileges and Immunities Clause are "mutually reinforcing," *Hicklin* v. *Orbeck*, 437 US 518, 531-532 (1978), and the Solicitor General acknowledges that relationship. U.S. Br. 21. To impose the requirement of intentional discrimination on Privileges and Immunities Clause claims would effectively minimize the "reenforcing" capacity of the Clause.

In *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868), Justice Field's often-quoted opinion for the Court said:

> It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. * * * It has been justly said that no provision in the Constitution

---

[7] Amicus Western United Dairymen argues that the California regulatory scheme does not discriminate against out-of-state milk producers. The factual issue of discrimination, however, cannot be decided on a motion to dismiss. It is sufficient for present purposes that discrimination was properly pleaded and placed before the courts below. C.A. E.R. Tab 5, ¶ 70; see also Pet. Br. 43 n.16.

> has tended so strongly to constitute the citizens of the United States one people as this.

Accord *Lunding*, 522 U.S. at 296; *Hicklin*, 437 U.S. at 524. That assessment of the broad, structural purposes and functions of the Privileges and Immunities Clause, along with the views expressed in more modern cases (*Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274 (1985); *United Building & Construction Trades Council, supra*; *Hicklin* v. *Orbeck, supra*; *Austin* v. *New Hampshire, supra*; *Toomer* v. *Witsell*, 334 U.S. 385 (1948)), addresses itself to results to be achieved and not the motives of state legislators and regulators. The harm to national unity and to the concept of a free market are the evils to be avoided. The presence of those evils is not reduced or eliminated when they are produced by inadvertence.

As revealed in Commerce Clause analysis, discrimination may appear in several forms – on the face of a statute, by discriminatory intent behind a facially neutral statute, or by discriminatory effect of a facially neutral statute. See, *e.g.*, *Chemical Waste Management, Inc.* v. *Hunt*, 504 U.S. 334, 344 n.6 (1992); *Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1979). There is no reason why this Court should use this case to cut off Privileges and Immunities Clause scrutiny of some categories of discrimination. See also *Piper*, 470 U.S. at 284 n.17 (rejecting the dissent's contention that the only function of a less-restrictive-means analysis under the Privileges and Immunities Clause was to ferret out intentional discrimination, or the "illegitimate" state goal of "discrimination for its own sake").

In any event, the courts below did not reach – and this Court need not reach – questions about the kinds of discrimination that will actually violate the Privileges and Immunities Clause. The Ninth Circuit held that "classifications * * * based on the location where milk is produced" need not even be *scrutinized* under the Privileges and Immunities Clause (Pet. App. A14), and that holding flies in the face of this Court's

precedents. The Court should reverse that holding and leave further analysis of the constitutional merits to the courts below.

III. RESPONDENTS AND THEIR AMICUS MISSTATE CRITICAL FACTS BEARING ON THE CONSTITUTIONAL MERITS, BUT THE COURT NEED NOT RESOLVE THOSE ISSUES

Respondents and their amicus mischaracterize the amended pooling plan as simply an accounting system that has no real-life impacts on the ability of out-of-state dairy farmers to sell milk to California processors. To paint that picture, respondents and their amicus engage in inventive semantics to obfuscate the differences in form and function between California's regulation since 1935 of minimum classified milk prices payable by processors (under the Milk Stabilization Act and Stabilization Plans), and the State's redistribution of these minimum prices to California dairy farmers since 1969 (under the Gonsalves Pooling Act and Pooling Plan).

A processor's "gross pool obligation" is exclusively a function of, and derived from, minimum milk pricing under the Stabilization Act. Other terms and concepts in the "elaborate accounting system" (Resp. Br. 5) refer to the manner in which regulated prices are redistributed to California dairy farmers, and the processors' ministerial obligations in this process.[8] At bottom, however, the processors' payments to dairy farmers, plus payments to the pool, represent nothing more than payment of (or accounting for) minimum prices owed under the Stabilization Act. The *form* – as opposed to the *amount* – of those payments is bifurcated for the convenience of Califor-

---

[8] Thus, the terms "quota price," "overbase price," "pool price," "blend price," "quota credit," "pool obligation," "credit against gross pool obligation," "pool obligation credit," "pool credit," and "credit price" (Resp. Br. 6-9; WUD Br. 5-10) are purely functions of revenue redistribution among California farmers; they do not alter the processor's minimum price obligations.

nia's dairy farmers. See Pet. Br. 8; U.S. Br. 16-17; Resp. Br. 29.

Because pool accounting on the processor side does nothing more than enforce minimum classified milk prices under the Stabilization Act, California's establishment of *any* "gross pool obligation" on out-of-state milk is a regulation of minimum pricing for out-of-state milk. Thus, respondents' claim that "*pooling plan amendments* do not establish any minimum price that a California processor is required to pay for out-of-state milk" (Resp. Br. 9 (emphasis added)) is artfully disingenuous in that processor minimum prices are fixed under the Stabilization Act, not the Pooling Act.

Nevertheless, respondents now attempt to disavow the finding that they acceded to during the preliminary injunction hearing before the district court that Stabilization Act Sections 62077 and 62078 (JA 25), as applied to out-of-state milk, violate *Baldwin* v. *Seelig* (P.I. Tr. 2 (July 31, 1997); P.I. App. Tab 42 at 6 n.13; P.I. App. Tab 28) by saying that California's minimum price laws apply only to milk produced *in California*. See Resp. Br. 1 ("California has its own laws establishing minimum prices paid by California processors *for milk produced within the state* and the minimum prices received by the producers for that milk.") (emphasis added); *id.* at 2 ("Nor does California mandate any minimum prices for milk produced outside of California."); see also WUD Br. 21. If those assertions were accurate, these lawsuits would not have been necessary. The record reflects that California's laws and regulations provide for a *Baldwin*-prohibited minimum price in at least two ways.

First, Sections 62077 and 62078 of the Stabilization Act violate the Commerce Clause under *Baldwin* v. *Seelig* when applied to out-of-state milk. P.I. Tr. 2, 31. Those provisions make no distinction between in-state and out-of-state milk, and they have been used in the past to enforce minimum prices with respect to out-of-state milk. P.I. Tr. 2. Second, even

while claiming that California does not now enforce those sections, the State in fact continues to enforce a "gross pool obligation" equal to the minimum classified price on out-of-state milk, and after applying a credit to that obligation requires a payment "into the pool" for the benefit of and distribution to California producers. Resp. Br. 5-6.

Additionally, WUD somehow turns petitioners' clear allegations of a *Baldwin*-prohibited minimum price on their head and incorrectly argues that petitioners' sole constitutional objection to the 1997 amendments is that they impose a maximum price. WUD then relies on cases such as *County Line Cheese Co.* v. *Lyng*, 823 F.2d 1127 (7th Cir. 1987), and *Lehigh Valley Coop.* v. *United States*, 370 U.S. 76 (1962), which scrutinize the milk regulatory actions of the U.S. Secretary of Agriculture, for the proposition that a maximum price is permissible. WUD Br. 18-19. But California does not have the luxury of emulating the U.S. Secretary of Agriculture, who has express statutory authority to regulate interstate commerce and to equalize payments to farmers and to processors. 7 U.S.C. § 608 *et seq*. It is inappropriate to rely on *Lehigh* or *County Line* to ascertain that which constitutes permissible *state* regulation.[9]

Respondents' effort to ascribe a non-protectionist purpose to the 1997 pooling amendments, and to characterize them as wholly in-state regulation, has caused respondents to mix concepts that cannot logically justify the 1997 pooling amendments. Respondents state that the 1997 pooling amendments were necessary to remove an artificial incentive for California processors to purchase out-of-state milk for less. Resp. Br. 7-8. First, the record demonstrates there was no such incentive. Even before 1997, California processors were paying

---

[9] Petitioners have cited *Lehigh* for the proposition that not even the federal government is permitted to impose pool charges that insulate farmers from interstate milk competition. Pet. Br. 40.

the minimum price on both in-state and out-of-state milk. P.I. Tr. 2; P.I. App. Tab 42 at 6 n.13. Since the total price California processors were paying for out-of-state and in-state milk was the same, the 1997 pooling amendment cannot have been necessary to remove an incentive California processors had to purchase out-of-state milk over in-state milk.

Still further, this rationale would have the Court believe that changes in pooling would somehow affect a California processor's total minimum price obligation. However, the pooling regulations do not alter the total minimum price paid by California's processors; pooling affects how or whether the minimum price is allocated between the California dairy farmer revenue pool and the actual dairy farmer supplier. Pet. Br. 8, U.S. Br. 16-17. California dairy farmers through CDFA sought not to alter the *buyers'* incentives but to diminish the economic incentive to *sell* out-of-state milk to California processors by intercepting out-of-state dairy farmer revenue (the pool obligation) and dividing it among California dairy farmers exclusively. Pet. Br. 38-39. Thus, for out-of-state dairy farmers, changes in the 1997 pooling plan were far from a simple accounting change.[10]

---

[10] Even if one assumes that roundtripping (see Resp. Br. 29-30) was the primary catalyst for the 1997 pooling amendments – though petitioners have strenuously argued below that it was not – the existence of roundtripping itself demonstrates that the 1997 amendments were designed to have real-life impacts on dairy farmer incentives to sell milk into California from out of state. Respondents themselves described roundtripping as a practice by *California farm groups* to obtain a better price for California overbase milk, whereby non-quota milk was shipped out of state by California dairy farmers and replaced with a commensurate volume from out of state, which was then returned to California. CDFA C.A. Br. 16. This description reveals that the changes to the pooling plan, even if intended to deal with the problem of roundtripping, altered the economic incentives of dairy farmers (not processors) by altering the price dairy farmers

Finally, amicus erroneously suggests that there can be no discrimination because "the 1997 Amendment has set the credit for out-of-state milk at the *highest* price that only a handful (3.4%) of California producers receive." WUD Br. 19. That statement both is untrue[11] and misses the point. The true benefits of pooling cannot be measured solely by the level of the blend price received. Pet. Br. 41. By mandating the pooling of out-of-state milk to intercept revenue from out-of-state milk transactions, without also granting to out-of-state farmers full access to pooling, the 1997 amendments subjected out-of-state dairy farms to disparate treatment that benefited California dairy farmers at the expense of out-of-state dairy farmers in violation of *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 199 (1994); see also Pet. Br. 41. Thus, it is a hollow exercise for WUD to argue that the amended pooling plan can somehow be defended as a "direct subsidization of local industry" when out-of-state funds are being used. Cf. *New Energy Co.* v. *Limbach*, 486 U.S. 269 (1988).

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

---

could receive on milk shipped from outside of California.

[11] The language of the amended regulation makes clear that the "credit" (and thus the price paid to the out-of-state dairy in practice) is the *lower* of modified quota or plant blend. Pooling Plan § 900(d), JA 47-48. Out-of-state dairies have often sold milk to plants that have a plant blend price below quota. Gruebele Supp. Decl. ¶ 23, C.A. E.R. Tab 11N at 8-9. Additionally, even if petitioners could always be paid the quota price, it still would not be the "highest price" available; out-of-state dairy farmers are denied the pool subsidy (as high as 58 cents per hundred pounds of milk) known as a transportation allowance. See Pooling Plan § 921.2(e), (f) <http://www.cdfa.ca.gov/mkt/mp/POOLPLAN_09-01.pdf>.

Respectfully submitted,

LAWRENCE S. ROBBINS
ROY T. ENGLERT, JR.
ROBBINS, RUSSELL, ENGLERT
ORSECK & UNTEREINER LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

CHARLES M. ENGLISH, JR.*
WENDY M. YOVIENE
NICHOLAS C. GEALE
THELEN REID & PRIEST, LLP
701 Pennsylvania Ave., N.W.
Suite 800
Washington, D.C. 20004
(202) 508-4000

* *Counsel of Record, 01-950*

JOHN H. VETNE
15 Powow St.
Amesbury, MA 01913
(978) 388-2480

RICHARD HESSE**
2 White Street
Concord, NH 03301
(603) 228-1541

** *Counsel of Record, 01-1018*

APRIL 2003